

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIESTE, LLC, ET AL.,

Plaintiffs,

v.

HILL REDWOOD DEVELOPMENT, ET AL.,

Defendants.

AND RELATED COUNTERCLAIMS

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No. C 09-04024 JSW

**ORDER EXCLUDING  
AFFIRMATIVE DEFENSES**

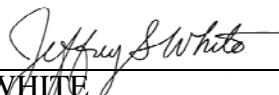
Following the pretrial conference, the Court issues this Order to provide its ruling on Plaintiffs' request to preclude Defendants from offering the affirmative defenses of comparative fault and mitigation of damages. Defendants did not assert these defenses in their answers, did not disclose these defenses in response to contention interrogatories, and did not raise the issue with Plaintiffs until preparing for the pretrial conference. Indeed, Defendants did not include these defenses in the proposed pretrial order the parties submitted with their pretrial conference filings. During oral argument on Plaintiffs' motion, Plaintiffs demonstrated that they would be prejudiced by permitting Defendants to argue these defenses to the jury. Accordingly, having carefully considered the parties' briefing on this issue and their arguments at the pretrial conference, the Court GRANTS Plaintiffs' motion in limine to preclude Defendants from raising these affirmative defenses at trial.

With respect to the issue of mitigation of damages, although Defendants are precluded from defending against Plaintiffs' claims on this basis, the Court expressly reserves ruling on whether the jury should be instructed on the question of whether Plaintiffs have a duty to mitigate any damages they may have suffered.

Therefore, the Court shall revisit that issue at the time of the final charging conference.

**IT IS SO ORDERED.**

Dated: February 7, 2012

  
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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE